

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

ISRAEL A. LERMA,	)	
	)	No. CV-09-03028JPH
Plaintiff,	)	
	)	ORDER GRANTING PLAINTIFF'S
v.	)	MOTION FOR SUMMARY JUDGMENT
	)	AND REMANDING FOR FURTHER
MICHAEL J. ASTRUE, Commissioner	)	ADMINISTRATIVE PROCEEDINGS
of Social Security,	)	
	)	
Defendant.	)	
	)	
	)	

BEFORE THE COURT is plaintiff's motion for summary judgment (Ct. Rec. 16) and defendant's motion to remand for further proceedings (Ct. Rec. 21), noted for hearing without oral argument on January 22, 2010. Attorney D. James Tree represents plaintiff; Special Assistant United States Attorney L. Jamala Edwards represents the Commissioner of Social Security ("Commissioner"). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 8.) On December 30, 2009, plaintiff filed a reply (Ct. Rec. 23). After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment (Ct. Rec. 16) and remands for further administrative proceedings. Defendant's motion to remand for further administrative proceedings (Ct. Rec. 21) is **DENIED** as moot.

///

ORDER GRANTING PLAINTIFF'S MOTION  
FOR SUMMARY JUDGMENT AND REMANDING  
FOR FURTHER PROCEEDINGS

**JURISDICTION**

Plaintiff protectively filed applications for disability insurance benefits (DIB) and for supplemental security income (SSI) benefits on October 24, 2005. Both applications allege onset as of November 15, 2004. (Tr. 58-60, 288-291.) The applications were denied initially and on reconsideration. (Tr. 32-33, 35-38.)

At a hearing before Administrative Law Judge (ALJ) R. S. Chester on August 19, 2008, plaintiff, represented by counsel and vocation expert William Wright testified. (Tr. 294-326.) On September 9, 2008, the ALJ issued an unfavorable decision. (Tr. 16-24.) The Appeals Council denied review on January 30, 2009. (Tr. 4-6.) Therefore, the ALJ's decision became the final decision of the Commissioner, which is appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review pursuant to 42 U.S.C. § 405(g) on March 2, 2009. (Ct. Rec. 1, 4.)

**STATEMENT OF FACTS**

The facts have been presented in the administrative hearing transcripts, the ALJ's decision, the briefs of both Plaintiff and the Commissioner, and are summarized here.

Plaintiff was 53 years old at the time of the hearing. (Tr. 298.) He lives with his 14-year-old son and fiancée. (Tr. 300-301.) Plaintiff stopped going to school in the eighth grade after failing seventh grade three times. (Tr. 302, 317.) He has worked in warehouses, as a janitor, and as a sorter. (Tr. 303-310.) Plaintiff can sit and stand for 10-15 minutes at a time. (Tr. 313-

1 314.)

2 **SEQUENTIAL EVALUATION PROCESS**

3 The Social Security Act (the "Act") defines "disability"  
4 as the "inability to engage in any substantial gainful activity by  
5 reason of any medically determinable physical or mental impairment  
6 which can be expected to result in death or which has lasted or  
7 can be expected to last for a continuous period of not less than  
8 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The  
9 Act also provides that a Plaintiff shall be determined to be under  
10 a disability only if any impairments are of such severity that a  
11 plaintiff is not only unable to do previous work but cannot,  
12 considering plaintiff's age, education and work experiences,  
13 engage in any other substantial gainful work which exists in the  
14 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).  
15 Thus, the definition of disability consists of both medical and  
16 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
17 (9<sup>th</sup> Cir. 2001).

18 The Commissioner has established a five-step sequential  
19 evaluation process for determining whether a person is disabled.  
20 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person  
21 is engaged in substantial gainful activities. If so, benefits are  
22 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If  
23 not, the decision maker proceeds to step two, which determines  
24 whether plaintiff has a medically severe impairment or combination  
25 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),  
26 416.920(a)(4)(ii).

27 If plaintiff does not have a severe impairment or combination  
28

1 of impairments, the disability claim is denied. If the impairment  
2 is severe, the evaluation proceeds to the third step, which  
3 compares plaintiff's impairment with a number of listed  
4 impairments acknowledged by the Commissioner to be so severe as to  
5 preclude substantial gainful activity. 20 C.F.R. §§  
6 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P  
7 App. 1. If the impairment meets or equals one of the listed  
8 impairments, plaintiff is conclusively presumed to be disabled.  
9 If the impairment is not one conclusively presumed to be  
10 disabling, the evaluation proceeds to the fourth step, which  
11 determines whether the impairment prevents plaintiff from  
12 performing work which was performed in the past. If a plaintiff  
13 is able to perform previous work, that Plaintiff is deemed not  
14 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).  
15 At this step, plaintiff's residual functional capacity ("RFC")  
16 assessment is considered. If plaintiff cannot perform this work,  
17 the fifth and final step in the process determines whether  
18 plaintiff is able to perform other work in the national economy in  
19 view of plaintiff's residual functional capacity, age, education  
20 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
21 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

22 The initial burden of proof rests upon plaintiff to establish  
23 a *prima facie* case of entitlement to disability benefits.  
24 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*  
25 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
26 met once plaintiff establishes that a physical or mental  
27 impairment prevents the performance of previous work. The burden  
28

1 then shifts, at step five, to the Commissioner to show that (1)  
2 plaintiff can perform other substantial gainful activity and (2) a  
3 "significant number of jobs exist in the national economy" which  
4 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>  
5 Cir. 1984).

#### 6 STANDARD OF REVIEW

7 Congress has provided a limited scope of judicial review of a  
8 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold  
9 the Commissioner's decision, made through an ALJ, when the  
10 determination is not based on legal error and is supported by  
11 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995  
12 (9<sup>th</sup> Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir.  
13 1999). "The [Commissioner's] determination that a plaintiff is  
14 not disabled will be upheld if the findings of fact are supported  
15 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572  
16 (9<sup>th</sup> Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence  
17 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d  
18 1112, 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance.  
19 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989);  
20 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d  
21 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such  
22 evidence as a reasonable mind might accept as adequate to support  
23 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)  
24 (citations omitted). "[S]uch inferences and conclusions as the  
25 [Commissioner] may reasonably draw from the evidence" will also be  
26 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965).  
27 On review, the Court considers the record as a whole, not just the  
28

1 evidence supporting the decision of the Commissioner. *Weetman v.*  
2 *Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989) (quoting *Kornock v.*  
3 *Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

4 It is the role of the trier of fact, not this Court, to  
5 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If  
6 evidence supports more than one rational interpretation, the Court  
7 may not substitute its judgment for that of the Commissioner.  
8 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
9 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by  
10 substantial evidence will still be set aside if the proper legal  
11 standards were not applied in weighing the evidence and making the  
12 decision. *Browner v. Secretary of Health and Human Services*, 839  
13 F.2d 432, 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial  
14 evidence to support the administrative findings, or if there is  
15 conflicting evidence that will support a finding of either  
16 disability or nondisability, the finding of the Commissioner is  
17 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir.  
18 1987).

#### 19 **ALJ'S FINDINGS**

20 At the outset, the ALJ found plaintiff met the DIB  
21 requirements through September 30, 2009. (Tr. 16.) The ALJ found  
22 at step one that plaintiff has not engaged in substantial gainful  
23 activity since onset. (Tr. 18.) At steps two and three, the ALJ  
24 found that plaintiff suffers from degenerative disc disease of the  
25 cervical (neck) and lumbar (back) spines (DDD), and intellectual  
26 functional capacity test results in the low-  
27 average/borderline/mental retardation range, impairments that are

1 severe but which do not alone or in combination meet or medically  
2 equal a Listed impairment. (Tr. 18, 20.) The ALJ found plaintiff  
3 less than completely credible. (Tr. 23.) Prior to step four, the  
4 ALJ found plaintiff's RFC enables him to perform "simpler" light  
5 work with a sit/stand option. (Tr. 21.) Relying on the VE, the  
6 ALJ found that a person with this RFC could perform plaintiff's  
7 past relevant work as a warehouse worker, agriculture produce  
8 sorter, janitor, and recycling sorter. (Tr. 23-24.) Because the  
9 ALJ's step four finding that plaintiff could perform his past  
10 relevant work was determinative, the ALJ was not required to  
11 proceed to step five. The ALJ found plaintiff is not disabled as  
12 defined by the Social Security Act. (Tr. 24.)

### 13 ISSUES

14 Plaintiff contends the Commissioner erred as a matter of law  
15 by failing to find plaintiff's impairments met or equaled a Listed  
16 impairment, rejecting a treating doctor's opinion, and finding Mr.  
17 Lerma could perform his past relevant work. (Ct. Rec. 17 at 10.)  
18 The Commissioner agrees the ALJ erred but seeks a remand for  
19 further proceedings, while plaintiff argues the Court should order  
20 a remand for payment of benefits. (Ct. Rec. 22 at 2.) The decision  
21 whether to remand for further proceedings or for an award of  
22 benefits is within the Court's discretion. *Reddick v. Chater*, 157  
23 F.3d 715, 728 (9<sup>th</sup> Cir. 1998).

### 24 DISCUSSION

25 Defendant argues because there are unresolved issues and the  
26 record does not clearly require a finding of disability, payment  
27 of benefits would be premature. In these situations, according  
28

1 to the Commissioner, further administrative proceedings are  
2 required. (Ct. Rec. 22 at 7-13, citing *Holohan v. Massanari*, 246  
3 F.3d 1195, 1210 (9<sup>th</sup> Cir. 2001); *Smolen v. Chater*, 80 F.3d 1273,  
4 1292 (9<sup>th</sup> Cir. 1996); *McAllister v. Sullivan*, 88 F.2d 599, 603 (9<sup>th</sup>  
5 Cir. 1989)).

6 Plaintiff argues he meets or equals Listing 12.05C (20  
7 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.05(C)) based on a  
8 combination of physical and mental impairments. (Ct. Rec. 17 at  
9 12-16.) To meet or equal Listing 12.05C, plaintiff must show he  
10 has a diagnosis of mental retardation, a valid IQ score of 60  
11 through 70, and a physical or other mental impairment imposing an  
12 additional and significant work-related limitation of function.  
13 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.05(C).

14 The Commissioner admits plaintiff meets the development prong  
15 of 12.05(C) based on Mr. Lerma's testimony he attended special  
16 education classes and was unable to complete the eighth grade.  
17 (Ct. Rec. 22 at 9.) The Commissioner argues plaintiff's mental  
18 impairment does not meet or equal the Listing, however, because  
19 plaintiff was not diagnosed with mental retardation and his only  
20 IQ scores in the record are provided by school psychologist Carrie  
21 Bishop, ESA, a source the Commissioner asserts was properly  
22 treated by the ALJ as an "other" rather an "acceptable" source.  
23 (Ct. Rec. 22 at 10.)

24 Plaintiff's reply cites 20 C.F.R. § 404.1513 (Ct. Rec. 23 at  
25 6-7), which provides, in part:

26 (a) Sources who can provide evidence to establish  
27 an impairment. We need evidence from acceptable  
28 medical sources to establish whether you have a  
medically determinable impairment(s). . . .



1 Acceptable medical sources are-

2 (2) Licensed or certified psychologists, or other  
3 licensed or certified individuals with other titles  
4 who perform the same function as a school psychologist  
5 in a school setting, for purposes of establishing  
6 mental retardation, learning disabilities, and  
7 borderline intellectual functioning only;

8 20 C.F.R. § 404.1513.

9 The Court agrees with plaintiff. The Commissioner  
10 incorrectly characterizes Ms. Bishop as an "other" rather than an  
11 "acceptable" source. As an acceptable source, Ms. Bishop's  
12 diagnosis could have been used by the ALJ to establish a medical  
13 impairment. 20 C.F.R. § 404.1513(a)(2). After testing Ms. Bishop  
14 found "his [plaintiff's] cognitive skills are currently within the  
15 deficient/mental retardation range." (Tr. 277.) The ALJ notes  
16 she further opined the discrepancy between his significantly  
17 higher performance scale than verbal scale should be taken into  
18 consideration with training potential. (Tr. 20, referring to Tr.  
19 277.) From Ms. Bishop's opinion it is unclear to the Court whether  
20 Mr. Lerma meets the requirements of the Listing.

21 With respect to establishing he suffers a significant  
22 *additional* impairment imposing an additional and significant work-  
23 related limitation of function, again for purposes of Listing  
24 12.05(C), plaintiff alleges his degenerative disc disease (DDD)  
25 meets this part of the Listing requirement. With respect to DDD,  
26 the Court observes the ALJ negatively albeit briefly assessed  
27 plaintiff's credibility, observing the record reflects plaintiff  
28 has "repeatedly failed to follow through with treatment,"  
including physical therapy (Tr. 22; 106-108). This indicates

1 plaintiff's back impairment may not be as debilitating as alleged.

2 The Court cannot find treating doctor Peter Harveson, M.D., 's  
3 opinion establishes plaintiff's DDD meets or equals the "other  
4 impairment" part of the Listings criteria. The ALJ points out Dr.  
5 Harveson assessed an RFC for light to moderate work with a medium  
6 lifting/carrying capability in April of 2007 (more than three  
7 years after onset). (Tr. 19, referring to Tr. 219; 256-257.) The  
8 ALJ observes in November of 2007, just five months earlier, Dr.  
9 Harveson noted plaintiff had been lifting weights and looked quite  
10 fit (Tr. 19, referring to Tr. 242).

11 In April of 2008, Dr. Harveson opined plaintiff needed to lie down  
12 once or more daily for 30 minutes to reduce back and neck pain,  
13 and it was likely Mr. Lerma would miss four or more days of work a  
14 month on average due to his medical condition (Tr. 265-266).

15 The ALJ points out the unexplained changes in Dr. Harveson's  
16 assessments. He also notes Dr. Harveson's assessed moderate  
17 limitation, in the ability to complete a normal workday and  
18 workweek without interruption from psychologically based symptoms  
19 and to perform at a consistent pace without an unreasonable number  
20 and length of rest periods, conflicts with Ms. Bishop's  
21 observations during testing. (Tr. 21.) A year after onset, in  
22 November of 2005, plaintiff exhibited "significant pain behavior,"  
23 as noted by the ALJ. (Tr. 19, referring to Exhibit 1F at 32-34.)

24  
25 The Court's review of the record indicates there are  
26 unresolved issues with respect to plaintiff's mental and physical  
27 impairments, some involving credibility determinations not within  
28 the Court's purview. And, the Court's review of the record does

1 not clearly require a finding of disability.

2 On remand, the ALJ should: (1) determine whether plaintiff  
3 suffers a mental impairment meeting or equaling Listing 12.05(C),  
4 by properly assessing the medical source evidence and obtaining  
5 additional tests if necessary; (2) make a new detailed assessment  
6 of the weight given all medical opinions, giving clear and  
7 specific reasons for the weight assigned to the opinions; (3) if  
8 necessary, obtain a medical  
9 expert's opinion with respect to Listing 12.05(C) and other issues  
10 deemed requiring clarification; (4) if necessary, make a new RFC  
11 assessment; and (5) make a new step four and, if necessary, step  
12 five analysis utilizing the services of a vocational expert.

13 The court expresses no opinion as to what the ultimate  
14 outcome will or should be. The fact-finder is free to give  
15 whatever weight to the evidence is deemed appropriate. See *Sample*  
16 *v. Schweiker*, 694 F. 2d 636, 642 (9<sup>th</sup> Cir. 1282) ("Questions of  
17 credibility and resolution of conflicts in the testimony are  
18 functions solely of the Secretary.")

#### 19 CONCLUSION

20 Having reviewed the record and the ALJ's conclusions, this  
21 court agrees with the parties that the ALJ's decision is not free  
22 of legal error and supported by substantial evidence, but finds  
23 there are unresolved issues and the record does not clearly  
24 require a finding of disability..

25 Accordingly,

#### 26 IT IS ORDERED:

27 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 16**) is  
28 **GRANTED**. The matter is remanded to the Commissioner of Social  
ORDER GRANTING PLAINTIFF'S MOTION  
FOR SUMMARY JUDGMENT AND REMANDING  
FOR FURTHER PROCEEDINGS

1 Security for further proceedings consistent with this decision and  
2 sentence four of 42 U.S.C. § 405(g).

3 2. Defendant's Motion to Remand (**Ct. Rec. 22**) is **DENIED as**  
4 **moot.**

5 The District Court Executive is directed to file this Order,  
6 provide copies to counsel for Plaintiff and Defendant, enter  
7 judgment in favor of Plaintiff, and **CLOSE** this file.

8 DATED this 31st day of December, 2009.

9 s/ James P. Hutton  
10 JAMES P. HUTTON  
UNITED STATES MAGISTRATE JUDGE